



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Asbestos Abatement of America, Inc.--Request for
Reconsideration
File: B-221891.2; B-221892.2
Date: August 5, 1986

DIGEST

Although original protest filed by the second low bidder against the proposed cancellation of a total small business set-aside was considered by the General Accounting Office (GAO) on the merits where the Small Business Administration (SBA) had yet to determine conclusively whether the low bidder was a small business concern, the protester is no longer an interested party entitled to request reconsideration of GAO's prior decision upholding the propriety of the proposed cancellation because the SBA's subsequent determination that the low bidder is in fact small means that the protester would not be eligible for an award even if the prior decision were to be reversed.

DECISION

Asbestos Abatement of America, Inc. (AAAI) requests reconsideration of our decision in Asbestos Abatement of America, Inc., B-221891, et al., May 7, 1986, 86-1 CPD ¶ 441. In that decision, we denied AAAI's protest against the proposed post-bid opening cancellation of invitation for bids No. 263-86-B(90)-0010, issued as a total small business set-aside by the Department of Health & Human Services (HHS) for the removal of asbestos and chemical residue from Building No. 4 at the National Institutes of Health.

We concluded that HHS had a compelling reason to cancel the set-aside, even though the agency may have initially erred in issuing the set-aside as the contemplated work was already contained in an unrestricted solicitation for the total renovation of Building No. 4, because AAAI's remaining low bid was unreasonable in price. In this regard, we determined that AAAI's bid, on its face, was 137 percent higher than the combined item price for the equivalent work submitted by the large business awardee under the unrestricted solicitation, and was 153 percent higher than the bid of Desco Insulation Company, whose apparent low bid under the set-aside had been originally rejected because the firm had certified itself as other than a small business concern.

AAAI now requests reconsideration of our May 7 decision on the principal ground that we erred in concluding that its bid was unreasonable in price so as to justify the set-aside cancellation. However, we deny the request because the firm is no longer an interested party within the meaning of our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1986), entitled to pursue the matter further.

During the pendency of the protest, Desco advised HHS that it had mistakenly furnished its certification as a large business and submitted evidence to show that it was, in fact, a small business concern. Accordingly, HHS contended that AAAI's protest should be dismissed because, even if this Office were to conclude that the proposed cancellation was improper and recommend that an award be made under the set-aside, Desco, the low bidder, and not AAAI, the second low bidder, would be in line for that award.

In our prior decision, we did not consider HHS' argument that AAAI was not an interested party because the Small Business Administration (SBA), with conclusive authority in such matters, had yet to determine Desco's actual status. However, the SBA now has determined that Desco is small for the purpose of this procurement and we believe this obviates any entitlement on AAAI's part to request reconsideration of our prior decision.

Generally, an interested party is defined as an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract. 4 C.F.R. § 21.0(a), supra; Wespercorp, Inc., B-220665, Feb. 18, 1986, 65 Comp. Gen. ___, 86-1 CPD ¶ 167. Where, for various reasons, a protester would not be in line for an award even if this Office were to resolve the protest in its favor, the firm lacks standing as an interested party to have the matters in issue considered on the merits. See, e.g., Multinational Business Services, Inc., B-221362, Jan. 9, 1986, 86-1 CPD ¶ 25; Comsel Corp., et al., B-221170.3 et al., Jan. 31, 1986, 86-1 CPD ¶ 115.

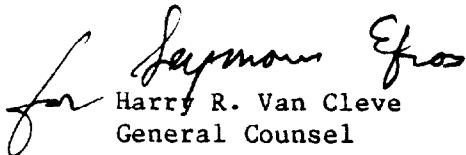
A party must also be "interested" in order to request reconsideration of a prior decision of this Office. 4 C.F.R. § 21.12(a). Thus, in the circumstances, we no longer view AAAI as an interested party because, even if the firm's request for reconsideration ultimately were to be upheld and we were to reverse our May 7 decision regarding the propriety of the set-aside cancellation, the firm would not be eligible for an award under the set-aside due to the SBA's determination that Desco, the original low bidder, is a small business concern. Accordingly, we deny the request for reconsideration. See Northwest Forest Workers Assoc., et al.--Reconsideration, B-218097.2, Aug. 6, 1985, 85-2 CPD ¶ 131; Government Contractors, Inc.--Request for Reconsideration, B-219411.2, Aug. 9, 1985, 85-2 CPD ¶ 152.

AAAI has repeatedly argued that Desco should not be viewed as eligible for an award under the set-aside because it took no interest in the protest proceedings and because it allowed its bid to expire. The record, however, shows that Desco took active steps to establish its status as a small business concern so as to rectify its mistaken self-certification and the firm, in fact, extended its bid acceptance period well beyond the issuance date of our prior decision. Moreover, to the extent AAAI continues to assert that Desco's bid is so low as to be

mistaken, we have already pointed out to the firm in our prior decision that such matters would be solely for resolution by HHS and Desco.

AAAI has also renewed its claim for the recovery of its bid preparation costs and its costs of filing and pursuing the protest, including attorney's fees. Although we recognized in our May 7 decision that AAAI incurred certain costs in preparing a bid in response to the set-aside solicitation, and in later protesting the proposed cancellation, we denied the claim in part because there had been no showing that HHS had acted in bad faith in originally issuing the set-aside--even though it was clear, as HHS itself acknowledged, that it should not have issued two solicitations which overlapped in terms of the scope of work without giving notice to small business bidders that a larger unrestricted procurement existed which might preclude the agency from making an award under the set-aside. In order to show bad faith, it is well-settled that the protester must submit essentially irrefutable proof that the contracting agency had the malicious and specific intent to injure the protester. Jack Roach Cadillac, Inc., B-210043, June 27, 1983, 83-2 CPD ¶ 25; Arlandria Construction Co., Inc., B-195044 et al., Apr. 21, 1980, 80-1 CPD ¶ 276. In our view, AAAI has clearly failed to meet its evidentiary burden to demonstrate that HHS' action in originally issuing the set-aside, even if erroneous, was taken with the intent to harm AAAI or any other small business bidder. Since we remain of the opinion that AAAI was not unreasonably excluded from the procurement, we again conclude that there is no legal basis to allow AAAI the recovery of its costs. 4 C.F.R. §§ 21.6(d) and (e).

The request for reconsideration is denied.


for Harry R. Van Cleve
General Counsel